LIBRARY
SUPREME COURT, U. S.

MOTION FILED MAY 3 1963

No. [redacted] 115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

GENERAL MOTORS CORPORATION, *Appellant*

v.

STATE OF WASHINGTON, ET AL., *Appellees*

MOTION FOR LEAVE TO FILE BRIEF, AND BRIEF AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT, OF THE NATIONAL COAL ASSOCIATION

ROBERT E. LEE HALL,
RICHARD L. HIRSHBERG,
Coal Building
1130 Seventeenth Street, N. W.
Washington 6, D. C.
Attorneys for Amicus Curiae

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
MOTION FOR LEAVE TO FILE BRIEF *Amicus Curiae* OF THE NATIONAL COAL ASSOCIATION	1
BRIEF *Amicus Curiae* OF THE NATIONAL COAL ASSOCIATION	5
Interest of *Amicus Curiae*	5
Argument	
I. Introduction	5
II. The business and occupation tax of the State of Washington, as interpreted and applied by the highest court of that State, violates the Commerce Clause of the United States Constitution	8
III. Conclusion	17

CITATIONS

CASES:

Brown-Forman Distillers Corp. v. *Collector of Internal Revenue*, 359 U.S. 28 (1959) 16
Commissioner v. *Eastman Kodak Co.*, 385 Pa. 607, 124 A. 2d 100 (1956) 3
Commonwealth v. *Eastern Motor Express, Inc.*, 398 Pa. 279, 157 A. 2d 79 (1959) 3
Cooney v. *Mountain States Telephone & Telegraph Co.*, 294 U.S. 384 (1935) 14
International Shoe Co. v. *Fontenot*, 359 U.S. 984 (1959) 16
Northwestern States Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1959) 13, 16
Norton Co. v. *Department of Revenue of State of Illinois*, 340 U.S. 534 (1951) 4, 14
Railway Express Agency v. *Virginia*, 347 U.S. 359 (1954) 3
Railway Express Agency v. *Virginia*, 358 U.S. 440 (1959) 3
Roy Stone Transfer Corp. v. *Messner*, 377 Pa. 234, 103 A. 2d 700 (1954) 3
Spector Motor Service, Inc., v. *O'Connor*, 340 U.S. 602 (1951) 3, 9, 12, 13

Page

CONSTITUTION:

Article I, Section 8, Clause 3 (the Commerce Clause) 8

STATUTES:

Connecticut Corporation Business Tax Act of 1935, Section 418c 12
Public Law 86-272, Title I, Section 101, 73 Stat. 355, 15 U.S.C. Sections 381-4 ..... 15, 16
Revised Code of Washington (RCW), 82.04.220, 82.04.270 (Business and Occupation Tax) 6, 8

MISCELLANEOUS:

Conference Report No. 1103 (1959) 16
House Report No. 936 (1959) 16
Senate Report No. 658 (1959) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

GENERAL MOTORS CORPORATION, *Appellant*

v.

STATE OF WASHINGTON, ET AL., *Appellees*

MOTION FOR LEAVE TO FILE BRIEF, AND BRIEF AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT, OF THE NATIONAL COAL ASSOCIATION

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, the National Coal Association respectfully moves for leave to file the accompanying brief in support of the Jurisdictional Statement of the Appellant as *amicus curiae* in this case. The consent of the Appellant has been granted. The consents of the Appellees have been requested, but have not been granted.

The National Coal Association is a trade association whose members mine and market more than two-thirds of the commercially produced bituminous coal in the United States.

The basic question involved in the present case is the power of a state to levy a tax on the privilege of engaging in interstate commerce measured by gross receipts from interstate commerce.

Approximately 75 percent of all coal produced in the United States is shipped in interstate commerce. A considerably larger portion of the commercially produced coal (that is, coal produced from other than "captive" mines owned and operated by steel companies, etc.) is shipped interstate. The exact figures are not available.

Based on an assumption that 75 percent of all coal produced in the United States is shipped interstate, the value of such interstate shipments would be approximately $2,510,000,000 for the year 1962. This figure is derived by multiplying the total coal production of 423 million tons in 1962 by the average value at the mine of $4.54 per ton plus the average rail freight rate of $3.37 per ton, and applying 75 percent to the result.

Several states and political subdivisions thereof other than the State of Washington levy taxes based on gross receipts. Two important examples of states into which large quantities of coal are shipped are Indiana and Michigan. In 1961, 19,891,000 tons of coal, with a value of $88,861,000, were shipped into Indiana from outside the state. In 1961, 24,327,000 tons of coal, with a value of $105,452,000, were shipped into Michigan from outside the state.[1]

[1] The comparable figures for the years 1957-1960 are as follows:

State	1957		1958		1959		1960	
	Thous. Tons	Value (Thous.)	Thous. Tons	Value (Thous.)	Thous. Tons	Value (Thous.)	Thous. Tons	Value (Thous.)
Indiana	22,510	$117,228	19,149	$93,731	19,294	$90,941	19,882	$91,778
Michigan	26,255	128,629	22,398	103,635	27,235	123,923	25,076	112,217

In the present case, the State of Washington has levied a tax amounting to 3/10 of 1 percent (.003) of gross sales of the Appellant to retail dealers within the state. Assuming that each of the states into which coal is shipped were to levy a tax of even 3/10 of 1 percent on gross sales, such taxes would total approximately $7,530,000 for the year 1962 (based on the assumption of approximately $2,510,000,000 worth of coal having been shipped interstate in 1962, as computed above). It is significant to note that this figure would closely approximate the total net income of all bituminous coal mining corporations filing income tax returns in 1959 ($8,027,000) and 1960 ($8,097,000)—the last two years for which figures are available.[2]

Thus it is apparent that the outcome of the present case could have a tremendous future impact upon the coal industry. If the decision of the Supreme Court of Washington is permitted to stand, furthermore, large tax liabilities for an indeterminate number of past years could be incurred by the coal industry, due to the fact that most states do not have a statute of limitations which applies when no tax return has been filed.

The decision of the Supreme Court of Washington is in conflict with the decisions of other state courts, and is entirely inconsistent with prior decisions of this Court. *Roy Stone Transfer Corp.* v. *Messner*, 377 Pa. 234, 103 A.2d 700 (1954); *Commissioner* v. *Eastman Kodak Co.*, 385 Pa. 607, 124 A.2d 100 (1956); *cf. Commonwealth* v. *Eastern Motor Express, Inc.*, 298 Pa. 279, 157 A.2d 79 (1959). *Railway Express Agency* v. *Virginia*, 347 U.S. 359 (1954); *cf. Railway Express Agency* v. *Virginia*, 358 U.S. 440 (1959). *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951); *cf.*

[2] Source: Statistics of Income, U.S. Internal Revenue Service.

Norton Co. v. *Department of Revenue of State of Illinois*, 340 U.S. 534 (1951).

To permit the states to tax gross receipts from interstate commerce, as the Supreme Court of Washington has decided in the present case, would impose a direct and crippling burden on interstate commerce, and particularly would have a serious, and perhaps disastrous, effect upon the bituminous coal industry. It is respectfully submitted that, because of the public importance of the issues involved in this case, the Court should determine that substantial constitutional questions are presented and should note probable jurisdiction.

Respectfully submitted,

ROBERT E. LEE HALL,
RICHARD L. HIRSHBERG,
Coal Building
1130 Seventeenth Street, N. W.
Washington 6, D. C.
Attorneys for Amicus Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

GENERAL MOTORS CORPORATION, *Appellant*

v.

STATE OF WASHINGTON, ET AL., *Appellees*

BRIEF AMICUS CURIAE OF THE NATIONAL COAL ASSOCIATION

INTEREST OF AMICUS CURIAE

The interest of the *amicus curiae* in this case is set forth in the motion to which this brief is attached.

ARGUMENT

I. Introduction

The Supreme Court of Washington has upheld the assessment of the Washington Business and Occupation Tax on the unapportioned gross proceeds of wholesale sales of automobiles, trucks, parts and accessories by General Motors, a Delaware Corporation, to independent retail dealers in the State of Washington

(*General Motors Corporation* v. *The State of Washington et al.*, 376 P. 2d 843).

The statute in question, hereafter referred to as the Business and Occupation Tax, imposes a tax in the following general terms (RCW 82.04.220):

> "*Business and occupation tax imposed.* . . . there is levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be."

The specific provision of the statute under which General Motors was held to be liable for the tax is RCW 82.04.270, providing in pertinent part:

> "*Tax on wholesalers, distributors.* (1) Upon every person . . . engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate . . . ."

RCW Chapter 82.04, "Business and Occupation Tax", is a part of RCW Title 82, "Excise Taxes."

The present case, when it reached the Supreme Court of Washington, involved cross-appeals from a judgment of the Superior Court for Thurston County (No. 28036, March 16, 1961). The judgment of the trial court partly sustained and partly rejected the contentions of General Motors. Briefly stated, this judgment:

> (1) Refunded to General Motors $87,253.34 in business and occupation tax (and interest) assessed on wholesale sales of motor vehicles, parts and

accessories to Chevrolet dealers in the nine southern counties of Washington (so-called "Chevrolet Class B Transactions") and to Pontiac and Oldsmobile dealers in the entire state, and enjoined further assessment on similar transactions; and

(2) Denied the claim of General Motors for refund of $232,584.95 in business and occupation tax (and interest) assessed on wholesale sales of motor vehicles, parts and accessories to Chevrolet dealers in Washington other than in the nine southern counties (so-called "Chevrolet Class A Transactions"), and denied injunctive protection against similar assessments in the future.

The only substantial difference between "Chevrolet Class A Transactions" and the other transactions at issue is that with respect to the former transactions General Motors, during the relevant periods, maintained a branch office in Seattle, Washington.

On appeal, the Supreme Court of Washington ruled against General Motors on both of these points. It reversed the decision of the trial court with respect to the appeal initiated by the State of Washington and affirmed it with respect to the cross-appeal initiated by General Motors.

Amicus curiae addresses its arguments solely to the constitutionality, under the Commerce Clause of the United States Constitution, of the application of the Business and Occupation Tax to the gross proceeds of the wholesale sales of motor vehicles, parts and accessories by General Motors to Chevrolet dealers in the nine southern counties of Washington (so-called "Chevrolet Class B Transactions") and to Pontiac and

Oldsmobile dealers in the entire state of Washington. (By so limiting its arguments, *amicus curiae* does not imply that other issues in this case were correctly decided by the Supreme Court of Washington.)

II. The Business and Occupation Tax of the State of Washington, as Interpreted and Applied by the Highest Court of that State, Violates the Commerce Clause of the United States Constitution

Revised Code of Washington 82.04.220 imposes a tax on "the act or privilege of engaging in business activities." As interpreted and applied by the Supreme Court of Washington, the Business and Occupation Tax imposes a direct burden on interstate commerce, and therefore violates the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, as consistently interpreted by the Supreme Court of the United States.

In upholding the assessment of the Business and Occupation Tax on wholesale sales of motor vehicles, parts and accessories to Chevrolet dealers in so-called "Chevrolet Class B Transactions" and to Pontiac and Oldsmobile dealers throughout the State of Washington, the State Supreme Court applies the tax "to all who engage, within the state, in the business of making sales at wholesale" (376 P. 2d 843, 851), further stating (*ibid.*):

> "It is only that local activity which is being subjected to taxation."

The Washington Court's examination of Commerce Clause considerations is limited solely to what it terms "the primary considerations for determining the limits of a state's power to tax activities connected with interstate commerce," which are (*ibid.*):

> "(1) Whether the tax places an extra burden on interstate commerce not borne by intrastate commerce, or erects barriers, placing out-of-state businesses at a disadvantage; the discrimination test. (2) Whether the interstate commerce involved is subject to the risk of repeated exactions of the same nature from other states; the multiple burden test."

Applying only these criteria, the court holds—erroneously, we respectfully submit—"that the tax in question is not violative of the commerce clause" (*id.*, 852).

No mention whatsoever is made of the controlling doctrine laid down in *Spector Motor Service, Inc.*, v. *O'Connor*, 340 U.S. 602 (1951).

In reaching its decision, the Supreme Court of Washington flatly states (*ibid.*):

> "The tax is imposed upon business activity within the state."

Accepting the facts as stated by the Washington Court, it is difficult to find any activities of General Motors, related to the transactions to which *amicus curiae* addresses itself, which are not an integral part of interstate commerce. According to the opinion (*id.*, 845):

> "All of the products herein concerned are manufactured outside of the state and shipped into the state. Activities conducted primarily outside the state include the design, engineering, fabrication, assembly and delivery of products; the procurement of materials, components and supplies; the general, executive, operating, financial and sales management; the receipt, processing, recording, approving, accepting and filling of orders; the billing and receipt of payment, the investigation, ap-

> proval and execution of customer contracts (dealer franchises); the investigation and extension of credit; the composition and placement of advertising; and others."

As further pointed out by the Washington Supreme Court (*id.*, 847),

> "The trial court found that the relationship between retailers and General Motors is that of independent purchaser and seller, and it cannot be said that General Motors had a 'dealer organization' within its hierarchy."

The only "business activity within the state" in which General Motors was engaged consisted of measures directed toward the promotion of interstate sales, which are described by the Court as follows (*id.*, 845):

> ". . . the establishment and maintenance of effective dealer representation, partially accomplished by arranging various sales and incentive contests and programs offered and conducted, separately or jointly, with the dealer and other components of the General Motors organization [sic];[1] national and local advertising programs conducted by General Motors through various media; joint programs conducted at the dealer's place of business to assist the dealer in maintaining and developing a prosperous used-car department, including training of the dealer's service personnel in the art of reconditioning automobiles utilizing mobile trainers; and on the job training of dealer employees seeking to develop a strong and capable service department so as to increase the quality of service

[1] *Quaere* as to how the phrase "the dealer and other components of the General Motors organization" can be squared with the trial court's finding (which the Supreme Court of Washington accepted) that "it cannot be said that General Motors had a 'dealer organization' within its hierarchy", *id.*, 847.

rendered to the retail purchaser of General Motors' products."

All of these activities are inseparable parts of interstate commerce, since they relate directly, and are incidental, to sales made by General Motors outside the State of Washington followed by the shipment of goods to dealers within the State. This fact seems to be tacitly recognized by the Supreme Court of Washington when it states (*ibid.*, emphasis added):

> "During the audit periods here in question, the trial court found that General Motors was engaged in business activity within the state. This activity involved the sale of automobiles, trucks, parts and accessories to retail dealers, *and also included* the establishment and maintenance of effective dealer representation. . . ."

The Court then went on to list the other activities, incidental to wholesale sales, in the passage quoted *supra*, page 10. Similarly, the Court recognized that (*id.*, 846):

> "General Motors achieves its wholesale sales of the automobiles, trucks, parts and accessories by the development and maintenance of a strong retail dealer representation, . . ."[2]

That no separable local activities were involved also seems to be the evident conclusion to be drawn from the following statements of the Court (*id.*, 849):

> "General Motors accomplishes wholesale sales of its products to retail dealers within the state. Part of the activities involved in these wholesale sales

[2] If this sentence means that the sales upon which these assessments are based were made in Washington, it conflicts with the recital quoted *supra*, pp. 9-10.

take place elsewhere; *e.g.*, orders are filled, delivery made, and payment is received outside of the state. Nonetheless, business activities having a relation to wholesale sales are conducted in Washington. These activities provide an incident upon which the taxing statute operates."

This being the incidence of the Business and Occupation Tax, such tax, as applied to and measured by the gross receipts from all wholesale sales of General Motors to Washington retail dealers, clearly violates the Commerce Clause.

Spector Motor Service, Inc., v. *O'Connor*, 340 U.S. 602 (1951), controls the present case. This Court held in that case that the Commerce Clause prohibits the imposition of even a non-discriminatory tax on the privilege of engaging in interstate commerce (even if the tax base is net income fairly apportioned to the taxpayer's activities within the state).

The Connecticut Corporation Business Tax Act of 1935, which this Court invalidated in *Spector, supra*, although employing a radically different measure, in its incidence was similar to the Washington Business and Occupation Tax, and provided in pertinent part (*id.*, 603, note 1):

"Sec. 418c. Imposition of tax. . . . every other corporation or association carrying on business in this state . . . shall pay, annually, a tax or excise upon its franchise for the privilege of carrying on or doing business within the state . . ."

Concluding that the application of this tax to a Missouri corporation engaged exclusively in interstate trucking violated the Commerce Clause, the Court said (*id.*, 608-9):

"The answer in the instant case has been made clear by the courts of Connecticut. It is not a

> matter of labels. The incidence of the tax provides the answer. The courts of Connecticut have held that the tax before us attaches solely to the franchise of petitioner to do interstate business. The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State."

Similarly, the answer in the present case has been made clear by the Supreme Court of Washington. By holding that Washington "business activities having a relation to wholesale sales" from General Motors to Washington retailers in interstate commerce "provide an incident upon which the taxing statute operates," the State Court has decided that the statute taxes the privilege of engaging in interstate commerce (376 P. 2d 843, 849).

Under the principles laid down by this Court in *Spector Motor Service, Inc.*, v. *O'Connor, supra,* and later reaffirmed in *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959), the Washington Business and Occupation Tax is invalid as applied in this case. In *Northwestern,* the Court said (358 U.S. 450, 458; *dictum*):

> "It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the States. *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824). In keeping therewith a State 'cannot impose taxes on persons passing through the state, or coming into it merely for a temporary purpose' such as itinerant drummers. *Robbins* v. *Taxing District,* 120, U.S. 489, 493-494 (1887). Moreover, it is beyond dispute that a State may

> not lay a tax on the privilege of engaging in interstate commerce, *Spector Motor Service, Inc.*, v. *O'Connor*, 340 U.S. 602 (1951)."

Norton Co. v. *Department of Revenue of State of Illinois*, 340 U.S. 534 (1951), is cited by the Supreme Court of Washington in support of its holding that the promotional activities of General Motors in relation to its wholesale sales to retail dealers in Washington "provide a sufficient nexus upon which to base the tax" for purposes of satisfying the requirements of the Due Process Clause (376 P. 2d 843, 851).

There is nothing in the *Norton* case to suggest, even remotely, that the Washington Business and Occupation Tax satisfies the requirements of the Commerce Clause. That case involved the Illinois Occupation Tax. This Court pointed out (340 U.S. 534, 535-6):

> "The statute specifically exempts business in interstate commerce as required by the Constitution, and the question is whether the State has exceeded the constitutional range of its taxing power by taxing all of petitioner's Illinois derived income."

In the *Norton* case, this Court also pointed out that a "concern does not, by engaging in business within the State, lose its right to do interstate business with tax immunity" (340 U.S. 534, 539), citing for this proposition *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U.S. 384 (1935).

In the *Cooney* case, the Court significantly stated (*id.*, 392-3):

> "There is no question that the state may require payment of an occupation tax from one engaged in

> both intrastate and interstate commerce. But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination."

In 1959 Congress acted to restrict the application of net income taxes to income derived from interstate commerce (P.L. 86-272, Title I, § 101, 73 Stat. 555, 15 U.S.C. §§ 381-4).

P. L. 86-272 provides, in general, that no State shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person are either or both of the following (15 U.S.C. § 381(a)):

> "(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> "(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

The purpose of this Act of Congress was to provide as the minimum jurisdictional requirement for the imposition of net income taxes the presence of an office

or similar permanent establishment within the State asserting liability for tax, thus dispelling certain doubts as to the potential out-of-state reach of net income taxes, which had been raised by this Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota, supra,* as well as by the denial of certiorari in *Brown-Forman Distillers Corp* v. *Collector of Internal Revenue,* 359 U.S. 28 (1959), and in *International Shoe Co.* v. *Fontenot,* 359 U.S. 984 (1959) (see House Report No. 936, Senate Report No. 658, and Conference Report No. 1103 (1959)).

When the Congress enacted P.L. 86-272, it clearly assumed that, as stated in the *Northwestern* case (358 U.S. 450, 458):

> "... it is beyond dispute that a State may not lay a tax on the privilege of engaging in interstate commerce."

This assumption that "privilege" taxes on interstate commerce based on unapportioned gross receipts were plainly unconstitutional is demonstrated by the fact that the Congress limited the impact of the 1959 Act to net income taxes, which it defined as taxes "imposed on, or measured by, net income" (15 U.S.C. § 383).

It would certainly frustrate the will of the Congress—to whom the Commerce Clause gives the exclusive power to regulate interstate commerce—for this Court to fail to reverse the present decision of the Supreme Court of Washington. The anomalous result would be that the application to interstate commerce of a "privilege" tax measured by the gross proceeds of sales would be permitted in situations where, by Act of Congress, even an apportioned net income tax could not be levied.

III. Conclusion

Amicus curiae respectfully submits that the decision of the Supreme Court of Washington extends the taxing power of the State beyond the limitations imposed by the United States Constitution, in particular the Commerce Clause thereof, and is seriously detrimental to interstate commerce.

The questions presented by this appeal are constitutionally substantial. Furthermore, their proper determination is of great public importance, and is of vital importance to the interests of the bituminous coal industry of the United States which *amicus curiae* is authorized to promote and protect.

Respectfully submitted,

ROBERT E. LEE HALL,
RICHARD L. HIRSHBERG,
Coal Building
1130 Seventeenth Street, N. W.
Washington 6, D. C.
Attorneys for Amicus Curiae